IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 206

HOUSTON INSULATION CONTRACTORS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Houston Insulation Contractors Association, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 31, 1966.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 357 F. 2d 182. The decision of the National Labor Relations Board and the Trial Examiner is reported at 148 N.L.R.B. 886.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on March 31, 1966, and a copy thereof is appended to this petition in the Appendix at pp. 9a-21a as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In a proceeding before the National Labor Relations Board, the Petitioner filed a charge against the International Association of Heat and Frost Insulators and Asbestos Workers and Local Unions No. 22 and 113, affiliated with the International Union, upon which a complaint was issued charging that refusals to apply the goods of Thorpe Products Corporation (Thorpe) and Techalloy Company, Inc. (Techalloy) constituted an unlawful secondary boycott within the meaning of §§ 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended. 29 U.S.C. §§ 158 (b)(i) and (ii)(B).

The Trial Examiner recommended a cease and desist order against the two local unions based upon the provisions of § 8(e) of the Act, 29 U.S.C. § 158(e), in that the provisions of the labor contract between Petitioner and the Unions was a violation of §§ 8(b)(4)(i) and (ii)(B), and that the exemption of § 8(e) did not apply because the evidence was clear that *the work performed on the material by Thorpe and Techalloy was performed at their shops and not at the jobsite.*

The Board dismissed the complaint in its entirety without discussing the impact of § 8(e) of the Act, although the Trial Examiner's decision was based thereon. The Board held that the activities of the two local unions were primary because "the object" thereof was to enforce a ban on subcontracting work contained in the labor agreement.

The Court of Appeals affirmed the order of the Board in part and reversed it in part, holding that § 8(e) applies only to those labor contracts which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with whom the union has a dispute. The Court sustained the Board in the dismissal of the charge against Local 22, and ignored direct and undisputed evidence that "an object" of the refusal to handle the products was a secondary boycott. The questions presented are:

1. Whether labor contract clauses proscribing prefabrication and subcontracting can be lawfully extended to off-jobsite work performed by the employees of secondary employers under § 8(e) of the National Labor Relations Act?

2. Have the requirements of substantial evidence necessary to support a dismissal of a case arising under §§ 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act been met, where undisputed testimony shows an unlawful object in the refusal to handle the goods and material of secondary employers, and other testimony shows other objects of such refusals to handle?

STATUTES INVOLVED

The pertinent portions of the National Labor Relations Act, 29 U.S.C. 158, §§ 8(b)(4)(i) and (ii)(B) and (e) thereof are set forth in the Appendix, at pp. 1a to 2a as Appendix A.

STATEMENT

These cases arose out of charges filed by Petitioner on August 8, 1963, charging that the International Association of Heat and Frost Insulators and Asbestos Workers and Local Unions No. 22 and 113, affiliated therewith, vio-

lated the provisions of §§ 8(b)(4)(i) and (ii)(B) of the Act by inducing the employees of Johns-Manville Sales Corporation (Johns-Manville) and Armstrong Contracting and Supply Corporation (Armstrong), members of the Association, to refuse to install certain insulation material with "an object" of causing those employers to cease doing business with Techalloy and Thorpe, respectively. (R. 6-9).

The charging party, and Petitioner here, is an association of insulation contractors of which Johns-Manville and Armstrong are members. They are engaged in the construction industry and were signatories to a contract with Local Union No. 22, which contained what are known as a "preparation clause" and a "subcontracting clause," which provided in pertinent part:

"Article VI

The Employer agrees that he will not sublet or *contract out* any work described in Article XIII * * *.

* * *

"Article XIII

This Agreement covers the rates of pay, rules and working conditions of all Mechanics and Improvers engaged in the *preparation, distribution and application* of pipe and boiler coverings, insulation of hot surfaced ducts, flues, etc., also the covering of cold piping and circular tanks connected with the same and all other work included in the trade jurisdictional claims of the Union." (emphasis supplied) (R. 190-191)

Johns-Manville was engaged in applying insulation to pipe at a construction project in Texas City, Texas, by employees who are members of Local 22 and working within its jurisdiction. Johns-Manville purchased pre-cut

stainless steel bands from Techalloy, a non-union producer of metal products. The employees of Johns-Manville, at the direction of the Union, refused to apply the precut bands at the jobsite.

Armstrong was engaged in applying insulation to pipes at a construction project at Victoria, Texas, under the jurisdiction of Local 113, and there was no contract in effect between those parties. For several years, Armstrong had purchased straight lengths of premolded asbestos insulation from Thorpe, a non-union contractor. Armstrong's employees in its shop at Houston, had mitred these pieces of straight length material in order that they would be available to cover curves and angles of pipe, and because power tools, which were difficult to move, were used in the process. In 1963 Armstrong purchased pre-mitred fittings from Thorpe, and Armstrong employees, who were members of the Union, refused to apply these materials at the direction of the Union.

Brooks Baker, a Vice President of the International Union who is also Secretary of Local 22, testified that the Union had instructed its members not to handle the products of Thorpe and Techalloy *because they were not in agreement with and had no contract with Thorpe and Techalloy.* (R. 78-79). It was never claimed by the witness that this was not one of the objects or reasons why the Union instructed its members not to handle the products of Thorpe and Techalloy, and it remains undisputed that they were non-union contractors, which was an object of the refusal to handle their materials. Subsequently, Baker testified that the only instance the Union told its members not to handle the products of Thorpe and Techalloy was when they were prefabricated and that it would be a violation of their working agreement to handle those products. (R. 80-81)

A written communication by Union Vice President Baker which detailed the use of and reasons for applying Union decals on materials *pre-prepared* off the jobsite, to identify the member who performed the off-jobsite work, and to show that the materials were *union-made,* indicates a like purpose. (R. 114-115).

The Trial Examiner found that the refusal of the Union to handle the products of Thorpe and Techalloy "was not a boycott of non-union products" and held that Articles VI and XIII of the Agreement were lawful, and that the dispute was a local one and that there was no evidence of involvement by the International Union.

The basis of the Trial Examiner's decision, that the activity of the Unions was unlawful, was that the contract between the Petitioner and Local 22 was "clearly a contract aimed at the exemption of Section 8(e)," but the exemption did not apply because the work of mitreing and cutting bands, even when performed by employees of Armstrong and Johns-Manville, was performed in *off-jobsite* shops, and, further, even if the Union was entitled to preserve the work of mitreing and cutting bands, they were not entitled to resort to economic coercion to enforce the contract. (R. 30-47).

The Board reversed the Trial Examiner and held that the activities of the two locals were primary because "the object" thereof was to enforce the ban on subcontracting work properly claimed by the employees under the collective bargaining agreement with Local 22. It dismissed the complaint as to the International Union. (R. 218-220).

The Court below said that the testimony of Union Vice President Baker indicated that "an object" of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy,

but held that the Board was not required to accept that testimony in the face of other testimony that the Union's objective was work preservation, and that the use of "decals" was a means of policing the ban on subcontracting and not to prevent the handling of non-union goods. (R. 330).

The Court below held that the proviso of Section 8(e) exempting the subcontracting of *jobsite work* in the construction industry did not apply because the Board did not reverse the Trial Examiner's finding that the mitreing and cutting of bands, when performed by Armstrong and Johns-Manville employees, was performed in their shops, not at the jobsite. The Court below held that Section 8(e), absent its proviso, does not render the contractual ban on subcontracting unenforceable and void, and it applies only to agreements which, on their face, require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with which the Union has a dispute, and "primary subcontracting" claims fall outside the ambit of § 8(e). (R. 333-334).

This application is not concerned with other issues in the case.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Limits the Application of the Construction Provision Exemption of the National Labor Relations Act Beyond What Was Intended by the Congress in its Enactment.

The Court below has interpreted the provisions of § 8(e) of the Act to apply only to those agreements which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with whom the union has a dispute. (R. 334). The decision in that regard is clearly contrary to this Court's

decision in *Allen Bradley Co.* v. *Local Union 3, I.B.E.W.*, 325 U.S. 797 (1945).

In *NLRB* v. *Washington-Oregon Shingle Weavers' Dist. Council, et al*, 211 F. 2d 149 (1954), the Ninth Circuit rejected that theory and affirmed the Board in *Sound Shingle Co.*, 101 NLRB 1159, 1161 (1952), where it stated:

> "It is true that in the usual type of secondary boycott there is a dispute with one employer followed by secondary activity against another employer with whom he has business dealings, to force a cessation of business with the primary employer. But because this kind of secondary boycott is more usual or more frequent does not mean that it is the *only* kind Congress intended to reach. We do not believe that, as to the type of conduct now before us, Section 8(b)(4)(A) contemplates the existence of an active dispnte, over specific demands, between the union and the producer of the goods under union interdict. The legislative history surrounding the enactment of Section 8(b)(4)(A), while difficult as a guide in many respects, does furnish reasonably clear guidance on the precise issue here. The Senate Committee Report on this section indicates that no demand upon the producer of the boycotted product is necessary to sustain the charge that a union has engaged in the type of 'secondary boycott' we have here under consideration." (Citing Allen Bradley Co. v. Local Union 3 and the Legislative History of the 80th Cong. fn. 7.)

The Court of Appeals for the Sixth Circuit in *NLRB* v. *Local 11, United Brotherhood of Carpenters and Joiners of America*, 242 F. 2d 932 (1957), likewise said:

> "The fact that there was not an active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents

> from the terms of § 8(b)(4)(A) of the Act, which neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. *N.L.R.B.* v. *Washington-Oregon Shingle Weavers' Dist. Council*, 9 Cir., 1954, 211 F. 2d 149, 152-153."

The legislative history of the Act and the plain language of § 8(e) show that the restrictive application of the secondary boycott provisions of the Act by the Court below was in error. In commenting on § 8(e) and its proviso, Senator Kennedy, in his statements concerning the Senate-House Conference Report on the amendments, at II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, as published by the NLRB, p. 1433, pointed out:

> "This *proviso affects only section 8(e)* and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U.S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force.
>
> • • •
>
> "It should be particularly noted that the proviso relates only to the 'contracting or subcontracting of *work to be done* at the site of the construction.' *The proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite, or suppliers who do not work at the jobsite.*" (Emphasis added.)

Thus the construction of § 8(e) by the Court below distorts the plain language of the statute so as to reach results which were unintended. *Department & Specialty Store Employees Union, Local 1265* v. *Brown*, 284 F. 2d 619 (9th Cir. 1960) cert. denied 366 U.S. 934; *N.L.R.B.* v. *Texas Natural Gasoline Corp.*, 253 F. 2d 322 (5th Cir. 1958).

There is a conflict among the Courts of Appeal as to various aspects of the application of Section 8(e) which

can only be resolved by this Court.* The Petition for a Writ of Certiorari in *National Labor Relations Board* v. *National Woodwork Manufacturers Assn. No. 1247*, October Term 1965, states that the issue goes to the heart of Section 8(e) and presents a clear-cut question of statutory construction that only this Court can lay to rest with which we agree.

2. The Decision Below is in Conflict with a Decision of the Court of Appeals for the Seventh District.

Because of a direct conflict in the decision of the United States Court of Appeals for the Fifth Circuit here, and the decision of the United States Court of Appeals for the Seventh Circuit in *National Woodwork Manufacturers Association*, 354 F. 2d 594 (1965),** and the decision of the National Labor Relations Board in *United Association of Pipe Fitters Local Union No. 539 and United Association of Plumbers and Gas Fitters Local Union No. 15 and American Boiler Manufacturers Association*, 154 N.L.R.B. No. 11 (1965), submitted to the Court of Appeals for the Eighth Circuit on May 9, 1966 and entitled *American Boiler Manufacturers Association* v. *National Labor Relations Board*, No. 18,106, 18,107, 18,200, this Court should grant review.

The conflict in the decisions of the United States Courts of Appeals has and will bring labor strife to the construction industry due to the uncertainty of the effect of the

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* See *Meat Drivers Local Union 710* v. *Labor Board*, 335 F. 2d 709, 713-717 (C.A.D.C.); *Orange Belt District Council of Painters* v. *Labor Board*, 328 F. 2d 534, 537-538 (C.A.D.C.); *Truck Drivers Union Local 413* v. *Labor Board*, 334 F. 2d 539, 548 (C.A.D.C.), certiorari denied, 379 U.S. 916; *Lewis* v. *Labor Board*, 350 F. 2d 801, 802 (C.A.D.C.); *Labor Board* v. *Joint Council of Teamsters*, 338 F. 2d 23, 28 (C.A. 9); *Todd Shipyards Corp.* v. *Marine and Shipbuilding Workers Union*, 344 F. 2d 107 (C.A. 2).

** Appendix E.

exemption of § 8(e) of the Act to off-jobsite prefabrication work performed by the employees of secondary employers which has been brought about by a misconstruction of the provisions of the pertinent provisions of the Act by the Board and the Court below.

The language of § 8(e) is plain and unambiguous in that the exemption here to be considered does not apply to the "contracting or subcontracting of the work to be done at the site of the construction," and the Court of Appeals, as well as the Board, have enlarged the scope of the proscription by finding that the picketing is primary in that it was directed against Johns-Manville and Armstrong to protect the work of the employees covered by the agreement.

The Court of Appeals for the Second Circuit in *NLRB v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 294*, 342 F. 2d 18 (1965), enforced an order of the Board prohibiting a boycott of suppliers delivering ready-mix concrete and held that the union was not insulated from the provisions of § 8(b)(4)(ii)(A) by the construction industry proviso to § 8(e) since the proviso is limited to "work done at the site of the construction," and held that "it does not sanction a boycott against suppliers who do not work on the jobsite." Citing, Burstein, The "Hot Cargo" Clause and L.M.R.D.A., Symposium on the Labor Management Reporting and Disclosure Act of 1959, at 888, 891 (Slovenko ed. 1961). H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., Sept. 3, 1959, at 39, in 1 N.L.R.B., Legislative History of the Labor Management Reporting and Disclosure Act of 1959, 943 (1959). It is significant to point out that the Court and Board both held that the act of mixing previously loaded ingredients in ready-mix trucks once they reached the project was not

"on-site work," as the union claimed, but merely the final act of the delivery process.

The Legislative History does not indicate any departure from the plain language of the Act to be permissible if the work is performed off the jobsite. Instead, the Legislative History of the Act makes clear that the purpose of the Landrum-Griffin bill was to extend the "hot-cargo" provisions of the Senate bill, which was theretofore applied only to Teamsters, to all agreement between an employer and a labor union to which the employer agrees not to do business with another concern. II Leg. Hist. 1432 (1959).

It is apparent that the construction placed upon the exemption provision of § 8(e) by the Court below follows the Board's claim that the statute cannot be literally construed, and if that be the case, the loophole of the *Sand Door* case* has not been closed as the Landrum-Griffin amendments intended.

The fact that there was no active labor dispute with Thorpe and Techalloy has no bearing upon the determination of the question here, nor does it make the secondary boycott of the products of those firms primary activity. *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675 (1951). For if "an object" of the refusal to handle is unlawful, the other considerations become immaterial. See also *National Woodwork Manufacturers Association* v. *NLRB*, *supra*, and *NLRB* v. *Washington-Oregon Shingle Weavers' District Council*, 211 F. 2d 149 (9th Cir. 1954).

We submit that this Court should grant the writ to resolve whether the interpretation of the Court below was in accord with the plain, unambiguous intent expressed in Section 8(e) of the statute.

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* *Local 1976, United Brotherhood of Carpenters and Joiners of America* v. *National Labor Relations Board*, 357 U.S. 93 (1958).

3. The Decision Below Misconstrues This Court's Decision in Universal Camera Corp. v. N.L.R.B. so as to Nullify and Conflict with This Court's Decision in N.L.R.B. v. Denver Building and Construction Trades Council.

The decision in *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 689 (1951), states the settled rule that where one of the several objects of a strike is illegal, the strike is tainted by this unlawful object and is unlawful. This is true even though the strike may have had a number of legal purposes. Union Vice President Baker unequivocally admitted that one object of the strike was to achieve an unlawful boycott of the goods and products of Thorpe and Techalloy where he said that the Union had instructed its members not to use the products of Thorpe and Techalloy under all circumstances because there was no contract with them. (R. 78-79).

The Court below misapplied this Court's decision in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1950), and disregarded Union Vice President Baker's statement of the illegal purpose on the ground that it could not disturb the Board's choice between two fairly conflicting views, even though the Court said:

> "This testimony does indicate that Baker at least may have believed that 'an object' of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy." (R. 330)

There is obviously no conflict here. A strike can have both a lawful purpose and an unlawful purpose. An executive of the Union has admitted that one of the purposes of the strike was an unlawful attempt to achieve a secondary

boycott. As this Court stated in *Denver Building Trades Council:*

> "* * * it is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract."

Thus, the Court below ignored an admitted illegal object of the strike and looked merely to what it found to be the lawful object of the strike. (R. 334) Under *Denver Building Trades Council,* it has no right to do so. The fact that other objects are preventing a violation of the contract, whether lawful or not, for objects of the refusal to handle as well, does not permit the Court below to ignore the substantial evidence that "an object" of the Union's activity was plainly proscribed as a secondary boycott of the products of non-union employers by the provisions of §§ 8(b)(4)(i) and (ii)(B) of the Act. *N.L.R.B.* v. *Milk Drivers and Dairy Employees Local Union 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 341 F. 2d 29 (2nd Cir. 1965).

We submit this Court should grant review to correct the manifest error of the lower court under the settled rule in such cases.

The questions presented in this case are of great and reoccurring significance in the administration of the National Labor Relations Act, especially in the building and construction industry. The resolution of the problems stated above will promote industrial peace in many cases.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari be granted.

Respectfully submitted,

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June 3, 1966

APPENDIX A

The relevant provisions of the National Relations Act, as amended, 61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*, are as follows:

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents —

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

* * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer

ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alternation, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21910

HOUSTON INSULATION CONTRACTORS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petitioner's Motion for Stay and Restraining Order.

(December 8, 1964.)

Before RIVES, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: Petitioner (Houston Insulation) in connection with its Petition for Review, moves for an order staying the decision and order of the Board, dated September 4, 1964, and for a restraining order against the Union (International Ass'n of Heat and Frost Insulators, and Locals 22 and 113 thereof) pending a determination of the issues involved in a full dress review by this Court. We have concluded that the stay should be granted and that the motion for the restraining order should be denied.

Petitioner charged the Union with engaging in a secondary boycott in violation of § 8(b)(4)(i) and (ii)(B). At the behest of the Board's Regional Director acting under § 10(1) (which empowers him to seek appropriate injunctive relief), Judge Ingraham of the Southern District of Texas, after conducting a full hearing, found and concluded that there was reasonable cause to believe that

the Union was engaging in unlawful conduct. Accordingly, the Union Respondents were enjoined from refusing to handle materials for nonunion contractors on jobs being performed by members of the Petitioner-Association, pending a Board determination (see note 3, *infra*). The Trial Examiner agreed with the Regional Director and the District Court finding the two Locals — but not the International — guilty of an unlawful secondary boycott and recommended that a cease and desist order be issued. The Board however — apparently as a matter of law, not one of credibility choices — took the view that the Union had engaged only in protected primary activity and ordered the complaint dismissed. The Petitioner thereupon instituted this proceeding seeking reversal of this decision. In the course of this motion for interim relief, the General Counsel has expressed the purpose of seeking formal dissolution of the District Court temporary injunction.

Setting forth a persuasive showing of a substantial basis for its legal contentions as they bear on the likelihood of ultimate success in this Court on the legal issue of the propriety of the Board's order and a convincing demonstration of irreparable harm in the meantime if the Union is allowed to resume the complained of activity, Petitioner asks that the Board's order be stayed, and an injunction pending appeal be entered.

Under the Act there can be no real question about the *power* of this Court to stay an order of the Board. The procedures governing a Board petition for enforcement to a Court of Appeals are set out in § 10(e). The parallel section, 10(f), grants to "any person aggrieved by a final order of the Board" the right to petition for review in a Court of Appeals. Recognition of the Court's power to enter a stay order in a proceeding of either kind is then expressly made in § 10(g):

"(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, *unless specifically ordered by the court*, operate as a stay of the Board's order." (Emphasis supplied

Actually no serious contest seems to be made by the Board on the issuance of a stay. The Board has, rather, focused its attention primarily on the asserted lack of jurisdiction in this Court to enter a restraining order at the instance of a private party.[1] The Court's power to enter a stay being clear under the Act,[2] the only question is whether this is an appropriate case for an exercise of that power.

After a thorough examination of the papers filed by all parties, a consideration of the proceedings in the District Court and those before the Trial Examiner and Board, we have concluded, without intimating how the issues should be resolved by a panel of this Court, that there is sufficient

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[1] Without now undertaking to determine whether, as urged by the Board's brief, these wide grants of power necessarily confine interim relief to that sought by the Board, not a private party, it is evident that the following from §§ 10(e) and (f) go a long way to reinforce the power to grant a stay implied in § 10(g).

"(e) * * * Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper * * *"

"(f) * * * Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper * * *."

Likewise § 10(h) reflects the policy that when courts under this structure are given power to issue restraining orders, etc., the Norris-LaGuardia Act, 29 USCA §§ 101 et seq, is not to be a bar.

[2] It is unnecessary to consider whether, apart from the Act, the Court has an inherent power to enter a stay. Cf. 28 USCA § 1651.

merit to Petitioner's position to justify preserving the status quo until the case is finally disposed of in this Court. Were Petitioner to ultimately prevail, the beneficial effect of our decision would largely be vitiated, if while awaiting hearing and disposition, the Union were permitted to resume its activities.

The effect of the stay is such that it is not necessary for this Court — assuming, but not deciding, that it has the power — to issue an injunction in order to preserve the status quo. While it is true that ordinarily a § 10(l) injunction expires upon final adjudication by the Board, our staying the Board's order effectually postpones its operative legal effect until enforced by this Court. Therefore Judge Ingraham's order granting a temporary injunction which was to run "pending the final disposition of the matters involved,"[3] and which the records of the District Clerk show to be subsisting, remains in full force and effect so long as our stay continues. No further relief is needed or appropriate.

Accordingly, a stay will be entered as of the date of the application. STAY GRANTED.

RIVES, Circuit Judge, Dissenting:

The majority makes clear that the so-called "stay" which it grants is intended to have the force and effect of an injunction.[1] I must respectfully dissent because that seems to me beyond the jurisdiction of this Court.

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[3] We do not read this language as going beyond the permissible scope of an injunction under § 10(1) — "appropriate injunctive relief pending the final adjudication by the Board."

[1] See the concluding two paragraphs of Judge Brown's opinion.

The Norris-LaGuardia Act[2] deprives the courts of the United States of jurisdiction to issue any restraining order or temporary or permanent injunction in a case such as this involving or growing out of a labor dispute, unless that jurisdiction has been subsequently conferred by the Labor Management Relations Act. See *Sinclair Refining Co.* v. *Atkinson*, 1962, 370 U.S. 195, 203. When granting appropriate relief provided in section 10 of the latter Act, it is expressly provided that ". . . the jurisdiction of courts sitting in equity shall not be limited by sections 101-110 and 113-115 of this title." 29 U.S.C.A. 160(h). However, as the Supreme Court observed in *Sinclair Refining Co.* v. *Atkinson, supra*, that Act permits "injunctions to be obtained, not by private litigants, but only at the instance of the National Labor Relations Board . . . ." (370 U.S. at 204.)[3] See also *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 4 Cir. 1948, 167 F.2d 183, 186, 187. Indeed, Congress expressly rejected a provision in section 12 of the House bill "for injunctions at the request of private persons, rather than by the Board, in cases like these."[4]

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[2] The opening section of that Act reads:

> "No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injuction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." 29 U.S.C.A. § 101.

[3] The only exception is a section not applicable to this case, 29 U.S.C.A. § 186(e), which the Court commented "stands alone in expressly permitting suits for injunctions previously proscribed by the Norris-LaGuardia Act to be brought in the federal courts by private litigants under the Taft-Hartley Act . . ." (370 U.S. 205, n. 19.)

[4] House Conference Report No. 510, June 3, 1947, on H.R. 3020, U.S. Code Cong. Serv., 80th Cong., 1st Sess. 1947, p. 1164.

Of the sections relied on by the majority (its footnote 1), section 10(e) relates to petitions by the Board for enforcement of its order and section 10(f) provides for the grant of temporary relief to the Board but not to a private litigant. See 29 U.S.C.A. § 160(e) and (f).

Jurisdiction to issue injunctive relief in a case of this kind, even on the Board's petition, is strictly limited to the period "pending the final adjudication of the Board with respect to such matter." Section 10(l) of the Act, 29 U.S.C.A. § 160(l). By its own terms the injunction expired on September 9, 1964, when the Board issued its decision and order dismissing the complaint.[5] It seems clear to me that this Court has no jurisdiction to grant the private petitioner's motion for stay and thereby to reinstate the injunction or continue it in force.

I therefore respectfully dissent.

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[5] "The final adjudication of the Board" is more limited than "the final disposition of the matters involved," the language of the district court upon which the majority seizes (its footnote 3) to stretch the terms of the injunction. Any such broadening or extension of the statutory language would have far-reaching effects not intended by Congress.

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21910

HOUSTON INSULATION CONTRACTORS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board Sitting at Washington, D. C.

(March 9, 1966.)

Before WOODBURY,* WISDOM and BELL, Circuit Judges.

WOODBURY, Senior Circuit Judge: This is a petition to review and set aside an order of the National Labor Relations Board dismissing a complaint issued upon charges filed in an association of contractors against two local unions and their parent union.

The petitioner, Houston Insulation Contractors Association, Contractors Association or simply Association, hereinafter, consists of a group of contracting companies in the Houston area banded together for the purpose, *inter alia*, of negotiating and administering collective bargaining agreements with Local 22 of the International Association of Heat and Frost Insulators and Asbestos Workers, AFL-

* Senior Judge of the First Circuit sitting by designation.

CIO. Article VI of the collective bargaining agreement in force between these parties at the time involved provided in material part: "The Employer agrees that he will not sublet or contract out any work described in Article XIII," which included "preparation" and "application" of coverings for the insulation of hot and cold surfaces such as pipes, boilers, tanks etc.

Johns-Manville Sales Corporation is a member of the Contractors Association. In 1963 it was engaged in applying insulation to pipe at a construction project at Texas City, Texas, within the territorial jurisdiction of Local 22. In order to secure the insulation to the pipe Johns-Manville's employees cut coils of stainless steel sheets into strips or bands used to hold the insulation around the pipe. In June or July Johns-Manville purchased pre-cut stainless steel bands from Techalloy Company, Inc., a non-union producer of metal products. Johns-Manville employees at the direction of their union officers refused to apply the pre-cut bands.

Armstrong Contracting and Supply Corporation is another member of the Contractors Association. In 1963 it was engaged in applying asbestos insulation to pipes at a construction project in Victoria, Texas, which is not within the territorial jurisdiction of Local 22, but of Local 113 of the International Union. For several years Armstrong had purchased straight lengths of premoulded asbestos insulation from Thorpe Products Company, a non-union firm, which Armstrong's union employees had mitered, that is to say, cut at angles with a saw and glued the cut sections together so that the straight-length material could be used to cover curves or angles in pipe. Originally mitering had been done on the job with hand tools. At the time involved, however, and apparently for several years before, mitering had been done in Armstrong's shop

in Houston by its employee-members of Local 22 using power tools inconvenient to move and the mitered fittings delivered to the jobsite. In the summer of 1963 Armstrong purchased pre-mitered fittings from non-union Thorpe Products Company. Armstrong's employees on the Victoria job, members of Local 113, at their union officers' direction refused to apply these pre-mitered fittings.

The Contractors Association filed charges against the International Union and its Locals 22 and 113 on which general counsel for the Board issued a complaint charging that the refusals to apply the goods of Thorpe and Techalloy constituted an unlawful secondary boycott within the meaning of § 8(b)(4)(i) and (ii) (B) of the National Labor Relations Act as it now stands amended, 29 U.S.C. § 158(b)(4)(i) and (ii)(B),[1] asserting that at least "an object" of the refusal to apply, which admittedly amounts to coercion, was to require Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. The International Union and the Locals denied that the refusals to use and apply the products of Thorpe and Tech-

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[1] "It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * *

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . ., to engage in, a strike or refusal in the course of his employment to use, . . . process, . . . or otherwise handle or work on any goods, articles, materials, or commodities . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where in either case an object thereof is . . .

* * * * * * *

"(B) forcing or requiring any person to cease using, . . . handling, . . . or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ."

alloy constituted a secondary boycott. They asserted that the refusals were protected primary activity because the sole object thereof was to preserve work their members were entitled to perform by virtue of the ban on subcontracting in the collective bargaining agreement.[2]

After hearing, the trial examiner found that "this was not a boycott of nonunion products." And he ruled that "Article VI and XIII of the agreement with the Contractors Association are lawful." Nevertheless he concluded that the refusal to handle Thorpe and Techalloy products was unlawful wherefore he recommended a cease and desist order against the local unions but not against the International Union saying that the dispute was a local one and that he had "no evidence that the International directed it or intervened in it."

The trial examiner rested his conclusion of unlawful activity by the local unions on § 8(e) of the Act, 29 U.S.C. § 158(e), quoted in material part in the margin.[3] He said

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[2] In the contract between Local 22 and the Contractors Association the employers agreed that in their operations outside the chartered territory of Local 22 they would abide by the rates of pay, rules and working conditions established by collective bargaining contracts between local insulation contractors and the local union in that territory. Local 113's contract with employers operating within its territorial jurisdiction where the work stoppage involving Armstrong's employees occurred contains a ban against subcontracting similar to the one in the contract between the Contractors Association and Local 22.

[3] "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, . . . whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, . . . or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract . . . containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, . . ."

that the agreement between the Contractors Association and Local 22 was "clearly a contract aimed at the exemption of Section 8(e)". But he said that the exemption did not apply because the evidence was clear that mitering and cutting bands, even when performed by Armstrong and Johns-Manville employees, was performed at their shops and not at the jobsite. In addition he ruled that, even if the workers were entitled to preserve the work of mitering and cutting bands by the contract, they were not entitled under the rule of the so-called *Sand Door* case, *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93 (1958), to resort to economic coercion to enforce the contract.

The three-member panel to which the Board delegated its powers pursuant to § 3(b) of the Act disagreed with the trial examiner and ordered the complaint dismissed in its entirety. Without discussing the impact of § 8(e) of the Act, although that section provided the basis for the trial examiner's decision, the panel held that the activities of the two local unions were primary because "the object" thereof was to enforce the ban on subcontracting work properly claimed by the employees under the collective bargaining agreement the lawfulness of which it said appeared to be conceded. On the basis of its conclusion of no unlawful activity by the local unions, it dismissed the complaint as to the International Union.

One member of the panel dissented from the order insofar as it dismissed the charge against Local 113. The majority of the panel pointed out that although Local 113 had no contract with the Contractors Association, nevertheless the Association had agreed with Local 22 that its member companies when operating outside the territorial jurisdiction of that union would "abide by the rates of pay, rules and working conditions established by collective bar-

gaining agreements between the Local (sic) insulation contractors and the local union in that jurisdiction" and that Local 113's contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Association. Wherefore the majority held that whether Local 113 be "regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22, it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." The dissenting member of the panel said that Local 113 was not a third-party beneficiary of Local 22's bargaining contract with Armstrong and that there was nothing to show that it was acting as agent for Local 22. He considered that since Local 113 had no agreement with the Contractors Association, its attempt to enforce the contract for the benefit of Local 22 constituted unlawful secondary activity.

The petitioner insists in this court that both the facts and the law require the Board to find that all three unions had violated § 8(b)(4)(i) and (ii) (B) of the Act.

On the facts, the petitioner contends that the record conclusively shows that "an object" of the refusals to apply was to force Johns-Manville and Armstrong to cease doing business with Techalloy and Thorpe. In support of this contention it would have us give conclusive effect to the testimony of one Brooks Baker, an officer of Local 22 and a vice-president of the International Union, who at one point testified that he had instructed the men not to handle the products of Thorpe and Techalloy because "we are not in agreement with Thorpe or Techalloy." This testimony does indicate that Baker at least may have believed that "an object" of the refusals to handle and apply was to force Johns-Manville and Armstrong to cease doing business with Thorpe and Techalloy. But the Board

was not required as a matter of law to accept Baker's statement as gospel in the fact of ample testimony, including later testimony of Baker himself, to the effect that the unions' objective was work preservation and in the face of the undisputed testimony that although Thorpe and Techalloy were non-union employers, neither local union had ever protested the use or application of any of their other products purchased by Johns-Manville or Armstrong but only protested the pre-cut bands and pre-mitered fittings. It may well be that the union officials hoped and expected, certainly we may assume that they would not have minded, if a result of their members' refusal to use and apply the bands and fittings was to put pressure on Techalloy and Thorpe as non-union employers. But hopes and expectations do not necessarily constitute "objects." An illegal "object" is something more than a result, even an inevitable result, of a work stoppage for a legitimate reason. Otherwise the right to strike would for practical purposes be nullified, a result which Congress clearly did not intend. See *Retail Clerks Union Local 770* v. *NLRB*, 296 F. 2d 368, 373 (C.A.D.C. 1961). The distinction to be drawn as best one can is between an object and a consequence. See *Local 761, International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667, 672 *et seq.* (1961).

The petitioner also would have us find conclusive evidence of an unlawful union object in its use of gummed labels or decals. These were supplied by the International Union to employers under contract with its locals and were applied by the union workers to the goods they made. The decals bore serial numbers by which the employer could be identified. When Johns-Manville and Armstrong employees received the Techalloy bands and Thorpe mitered fittings without decals they refused to apply them.

The use of decals is in itself a neutral fact. The decals could be used as a means of boycotting non-union goods or they could be used as a means of policing the ban on subcontracting. There is ample testimony in the record to support the conclusion that in this case the decals were used to police the ban on subcontracting. Moreover, there is undisputed testimony that other products of Thorpe and Techalloy purchased by Armstrong and Johns-Manville, which of course did not bear union decals, were not boycotted, and there is testimony that certain products made by union members and labeled as such were not applied when the serial numbers on the decals indicated that the products were not fabricated by employees entitled to the work under the contract.

Finally the petitioner relies on four other cases involving the same International Union and various of its locals as establishing an illegal pattern of union conduct. Apart from the broad proposition that past misconduct is not conclusive evidence of present guilt, the cases relied upon are clearly distinguishable. Three of them, *International Association etc. and Local 24 (Speed-Line Mf'g Co., Inc.,)*, 137 NLRB 1410 (1962); *International Association etc. and Local 125 (Insul-Caustic Corp.)*, 139 NLRB 659 (1962), and *International Association and Local 2 (Speed-Line Mf'g Co., Inc., and Fibrous Glass Products, Inc.,)*, 139 NLRB, 688 (1962), involved "premolded" fittings, not "prefabricated" ones as in the case at bar. The distinction, as the Board pointed out, is crucial, for prefabricated fittings are essentially hand made and could and customarily had been prepared by members of International's local unions, whereas premolded fittings are factory made with the use of heat and heavy machinery to produce curved or "L" shaped insulation. Neither Thorpe nor Armstrong makes or has the facilities to make premolded fittings. Nor do the

members of the locals have the skills to make such fittings. Thus in the cases cited above the Board quite reasonably concluded that in objecting to the use of premolded fittings the unions were not in fact seeking to obtain work claimable under their contracts but instead were objecting to the non-union status of the manufacturers of the premolded fittings.

The fourth case relied upon by the petitioner was decided by the Board subsequent to the case at bar and involved the same parties. *Local 22 International Association etc. and Houston Insulation Contractors Association (Mundet Cork Co.)*, 150 NLRB 156 (1965). In that case members of Local 22 employed by Mundet Cork Co. refused to apply aluminum jacketing supplied Johns-Manville ostensibly because it did not bear the union decal although in fact it had been made by union labor. The case is a peculiar one but it is readily distinguishable on the trial examiner's finding that the particular aluminum jacketing made by Johns-Manville had never been made and could not have been made by the Mundet employees and hence was not work within the contractural ban on subcontracting.

On the law, the petitioner relies primarily upon § 8(e) of the Act quoted in material part in footnote 3, *supra*. It asserts and we agree that the proviso exempting subcontracting jobsite work in the construction industry does not apply because the Board did not disturb the trial examiner's finding that the mitering and cutting of bands, even when performed by Armstrong and Johns-Manville employees, was performed in their shops and not at the jobsite. But we do not agree with the petitioner that § 8(e) absent its proviso renders the contractual ban on subcontracting unenforcible and void.

It is, of course, true that the agreement not to subcontract the work of preparation or application of insulation materials is in a certain sense an agreement whereby the employer agrees to refrain from handling, using or otherwise dealing in the products of another employer, if not also an agreement not to do business with another person. But to hold that a provision in the collective bargaining agreement against subcontracting was void and unenforcible because of its secondary effects would not square with *Fibreboard Corp.* v. *NLRB*, 379 U.S. 203 (1964), in which the Court held that "contracting out" work previously performed by members of an existing bargaining unit was a statutory subject of collective bargaining under § 8(d) of the Act. Section 8(e) was aimed at so-called "hot cargo" agreements whereby a union in effect forced employers to agree in advance not to do business with other employers with whom the union was not in agreement. It was not the congressional purpose to outlaw such traditional and typical activity as seeking to guarantee preservation of work traditionally done by a bargaining unit. *NLRB* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23, 28 (C.A. 9, 1964), and cases cited. In short, § 8(e) applies only to those agreements which on their face require an employer to cease or refrain from handling, using or otherwise dealing in the products of another employer with whom the union has a dispute. "Primary subcontracting claims, on the other hand, fall outside the ambit of § 8(e) . . . ." *Orange Belt District Council of Painters, No. 48* v. *NLRB*, 328 F. 2d 534, 537, 538 (C.A.D.C. 1964). An agreement banning the subcontracting of preparation work such as the one in the case at bar, not being a "hot cargo" agreement or on its face an attempt at a secondary boycott *in futuro*, § 8(e) does not apply.

We agree with the Board's dismissal of the complaint as to Local 22. We do not, however, agree with its dismissal of the complaint as to Local 113.

The problem presented by the refusal of the members of Local 113 to apply the pre-mitered fittings is so far as we know unique. As we have already pointed out Local 113 had no contract with Armstrong, although the Contractors Association of which Armstrong was a member had a contract with Local 22 which provided that members when operating outside the Local's jurisdiction "abide by the rates of pay, rules and working conditions established by collective bargaining agreements between the Local (sic) insulation contractors and the local union in that jurisdiction" and Local 113's bargaining contract in its jurisdiction contained a ban on subcontracting identical with that in Local 22's contract with the Contractors Association. On this basis the Board held that "Whether Local 113 is regarded as a third-party beneficiary of Local 22's bargaining contract or as agent of Local 22 it had the right to insist, in accordance with the terms of the contract, that Armstrong adhere to the lawful no-subcontracting clause." We do not agree.

The record is clear, as the trial examiner found, that mitering fittings would not have been done by members of Local 113 at the jobsite in Victoria, Texas, but would have been done by members of Local 22 employed by Armstrong at its shop in Houston. Thus the third party beneficiary theory is inapplicable because Local 113 would not have reaped any benefit from Local 22's contract. The agency theory has no factual support in the record. Moreover, we think the question presented by the behavior of Local 113 is not to be framed in terms of principles of the law of contracts or agency, developed in other contexts for other purposes. The fact of the matter is that Local 113

put economic pressure on an employer with whom it had no collective bargaining agreement to secure benefits to employees in another unit, Local 22. The question is whether such action by Local 113 comports with the underlying purposes and objectives of the Act. We think it does not.

Since Local 113 was not attempting to procure work for its members (they would not have done the mitering anyway) if it was not attempting to force Armstrong to cease and refrain from doing business with Thorpe, it was engaging in a controversy not its own but in Local 22's controversy with Armstrong. No doubt Local 113 had an emotional interest in coming to the aid of its sister local. But it had no economic interest in Local 22's claim of breach of contract. We think an emotional interest is too weak to justify conduct which necessarily has coercive impact on a neutral employer. Even if, strictly speaking, Local 113 was not engaged in a secondary boycott, it was coercing Armstrong not for its own benefit but for the benefit of another local at the expense of a neutral employer. We think the thrust of the Act, particularly § 8(b)(4), as set out in many secondary boycott cases[4] is to require each union to restrict its economic coercion to its own labor disputes and not to use that weapon in aid of another union.

Since we are affirming the order of the Board in part and reversing it in part the basis for the Board's declining to pass on the involvement of the International Union, *i.e.*, its finding that neither local had violated the Act, is destroyed. The case must go back to the Board for decision

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[4] See *NLRB* v. *Denver Bldg. Council*, 341 U.S. 675, 692 (1951), in which the Court described the congressional objectives of the Act as ". . . of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own.

of the question of the International Union's participation in Local 113's work stoppage.

The Order of the Board is enforced in part and reversed in part, and the case is remanded to the Board for further proceedings consistent with this opinion.

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,910

HOUSTON INSULATION CONTRACTORS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

DECREE

Before: Woodbury,* Wisdom and Bell, Circuit Judges

BY THE COURT:

THIS CAUSE came on to be heard upon a petition of the Houston Insulation Contractors Association to review and set aside an order of the National Labor Relations Board issued on September 4, 1964, dismissing a complaint against International Association of Heat and Frost Insulators and its Locals 22 and 113. The Court heard argument of respective counsel on March 25, 1965, and has considered the briefs and transcript of record filed in this cause. On March 9, 1966, the Court, being fully advised in the premises handed down its opinion affirming the said order of the Board in part and reversing in part, and remanding the case to the Board for further proceedings consistent with its opinion. In conformity therewith it is hereby

ORDERED, ADJUDGED, AND DECREED by the United States Court of Appeals for the Fifth Circuit that that part of

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* Senior Judge of the First Circuit sitting by designation.

the Board's order dismissing a complaint against Local 22, International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO be affirmed and that the part of the order dismissing the complaint against International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO, and its Local 113, be reversed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the case be remanded to the Board for further proceedings consistent with the opinion of this Court.

ENTERED MAR 31 1966

APPENDIX E

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 14904, 14988, 15064

SEPTEMBER TERM, 1965 — SEPTEMBER SESSION, 1965

NATIONAL WOODWORK MANUFACTURERS ASS'N., et al.,
Petitioners,

No. 14904 *vs.*
NATIONAL LABOR RELATIONS BOARD,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

No. 14988 *vs.*
METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Respondent.

METROPOLITAN DISTRICT COUNCIL OF PHILADELPHIA AND VICINITY OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioner,

No. 15064 *vs.*
NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petitions to Review, and Petition to Enforce, an Order of the National Labor Relations Board.

NOVEMBER 17, 1965

Before HASTINGS, *Chief Judge,* and SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Petitioner, National Woodwork Manufacturers Association, on behalf of its members, Hardwood Products Corporation, a Wisconsin corporation, and Mohawk Flush Doors, Inc., an Indiana corporation, herein called "NWMA", "Hardwood", and "Mohawk", respectively, asks us in No. 14904 to review and modify an order of the National Labor Relations Board, herein called the "Board", issued on November 12, 1964, dismissing, in part, a complaint against Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al., herein called the "Council" or the "Union".

In No. 14988, NWMA and Charles B. Mahin, an individual, made charges upon which the Board issued a complaint on August 27, 1963, and its amended complaint on October 4, 1963, alleging that respondent unions had engaged and were engaging in unfair labor practices in violation of section 8 (b) (4) (A), section 8 (b) (4) (B), and section 8 (e) of the Labor Management Relations Act of 1947, as amended, herein called the "Act", 29 U.S.C.A. § 158. In No. 14988, the Board seeks enforcement of its order entered against the Council and its affiliated local unions.

In No. 15064, the Council, Robert L. Gray and Charles L. Boyer, by their petition, seek an order setting aside the order of the Board to the extent that it finds against them and imposes sanctions on them.

Following a hearing before an examiner and the filing of his decision, the Board issued the aforesaid order of November 12, 1964, which dismissed all charges of violations except those with respect to the Union's conduct on three construction jobs described as (1) the Coatesville

Hospital job, at which L. F. Driscoll Company was general contractor; (2) the North Junior High School job, at which John J. McDonnell, Inc., was general contractor; and (3) the St Aloysius Academy job, at which Nason & Cullen, Inc., was general contractor; as to each of which the Board found violations of section 8 (b) (4) (B) but granted what NWMA considers only partial and inadequate relief.

Twenty-seven local carpenter unions in Philadelphia and in four other counties in Pennsylvania are affiliated with the Metropolitan District Council of Philadelphia and Vicinity. These locals are "serviced" by 11 business agents who work directly under Gray, the Council's secretary-treasurer and business manager. These business agents police the jobs and see that contracts are adhered to.

The Council engages in collective bargaining with individual employers and with the General Building Contractors' Association, Inc., (GBCA) which bargains on behalf of its employer members who build schools, hospitals, factories, and other structures in the Philadelphia area. The contracts in effect during the relevant period contain a provision similar to rule 17 of the Union's by-laws, which reads as follows:

> Rule 17. No employee shall work on any job on which cabinet work, fixtures, millwork, sash, doors, trim or other detailed millwork is used unless the same is Union-made and bears the Union Label of the United Brotherhood of Carpenters and Joiners of America.[1]
>
> *No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms*

[1] The first sentence in Rule 17 concededly violates section 8(e) but no issue is presented here concerning that aspect of the case.

which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted. This section to exempt partition work furnished in sections. (Emphasis added.)

It is petitioner's contention in No. 14904 that the Union engaged in an unlawful product boycott of prefabricated doors in the Philadelphia area and enforced an illegal hot-cargo contract prohibiting the use of such prefabricated doors[2] throughout said area.

Prefabricated doors are doors which are machined, processed and finished in various ways at the plants where they are manufactured. There was testimony that the use of prefabricated doors saves time and money.

Petitioner cites, as a matter of common knowledge, that the use of prefabricated doors has been greatly increasing in the construction industry, which extends to numerous other parts of building, such as windows, factory-built trusses, wall and partition assemblies, prefinished paneling, prefabricated kitchens and bathrooms, and on up to the point of prefabricated houses and other buildings.

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[2] (1) Prefitted doors which have been cut to exact size and beveled at the factory, so that they will fit into frame openings on the job without further machining.

(2) Precut doors which have been machined at the factory to receive hardware (locks, knobs, hinges, etc.), louvers, glass openings, and the like.

(3) Prefinished doors which have been preservative-treated, sealed, varnished, painted, or otherwise finished at the factory for ultimate use without further finishing. (Such doors must be completely machined before the final finish is affixed at the factory.)

(4) Armored doors which are completely machined at the factory and have plastic or other wear-resistant materials laminated to surfaces and edges.

(5) Prehung doors which are completely machined and assembled in door-frame units at the factory.

Prior to the present proceedings a letter was written in February, 1963, by Business Manager Gray of the Council to President Hutchinson of the United Brotherhood of Carpenters, stating that there was a serious problem of precut and prefitted doors coming into the Philadelphia area. Then followed a union drive to bar all prefabricated doors, which was implemented by the alleged boycotts and work stoppages that led to the NWMA charges against the Union and these proceedings.

Typical of the operation of the Union drive in this respect was the Coatesville Hospital job in May 1963. Driscoll, the contractor, purchased through a Pennsylvania millwork distributor, prefabricated architectural doors made by Hardwood for this job. In accordance with the architect's common practice, the specifications called for precut, prefitted and prefinished doors. On May 23, the day after the doors were delivered to the job, Union agent Boyer called from the job and told vice-president Brown of Driscoll that the prefinished doors could not be hung, because it was "in violation of an agreement". When Brown asked "where do we go from here?", Boyer said that he did not know and that if the doors were hung anyhow, the job would be "struck". Boyer admitted that his word was not final and that Brown could take it up with Gray. Brown then called Gray and stated what had occurred, but Gray said that "no carpenters from now on will hang pre-finished or pre-fit doors." Brown asked what could be done, because the hospital was hoping to get into the building, and Gray said that was not his problem. Thereupon Driscoll's secretary telephoned Gray and asked for an explanation and was told that Driscoll was in violation of rule 17 because the doors had been factory precut, and that the carpenters were not allowed to hang them. From May 23, when the Union carpenters discovered the

doors on the job, until May 27, they refused to hang them. They were then hung after the contractor agreed to pay the carpenters for work which they did not perform.

Such a solution was not reached in the North Junior High School, St. Aloysius Academy or Frouge Corporation jobs, the first two of which are factually not different from the Coatesville Hospital job.

Frouge Corporation was the general contractor on a housing project in Philadelphia, for which it ordered factory-machined Mohawk doors. Neither job specifications nor Frouge's contract required that the doors be precut, prefitted, or premachined. When the second shipment thereof arrived, Union agents did not allow their men to work on them. They cited rule 17 which was then shown to and read by President Frouge and Project Manager Green. Frouge had Green order 665 Mohawk doors, which, when delivered, did not bear a union label. Union carpenters did the cutting on the replacement doors which were then installed on the job.

The Board held that the Union violated § 8 (b) (4) (i) (ii) (B), by reason of its boycott of prefabricated doors on the Coatesville, North Junior High and St. Aloysius jobs, but as to Frouge, it held otherwise, giving as its reason, that, while in the first three jobs the specifications called for prefabricated doors and hence the Union target was the doors and persons making and distributing them, in *Frouge* the Union boycotted prefabricated doors which had been purchased by the contractor — but which were *not required* by job specifications. This conclusion seems to indicate that the Board held that the Union's target in *Frouge* was not the prefabricated doors and their manufacturer but rather contractor Frouge and that the situation involved only a primary dispute with him. We agree.

Section 8 (b) (4) (i) (ii) (B) reads as follows:

> (b) It shall be an unfair labor practice for a labor organization or its agents —
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> • • •
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> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where in either case an object thereof is —
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> • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, ... *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, *any primary strike or primary picketing* [emphasis supplied] . . . . .

We hold that Frouge was the object of a "primary strike or primary picketing" and therefore the Union was entitled to the protection of the proviso in § 8(b) (4) (B).

We now consider the objections of the Union to the Board's finding of violations of § 8 (b) (4) (B) as to the first three contractors above-named.

The language of the statute and its legislative history clearly indicate that § 8 (b) (4) (B) applies to the product boycott carried on by the Union in this case under its rule 17. In *Allen Bradley Co.* v. *United States,* 325 U.S. 797 (1945), it appeared that Local 3 of the Electrical Workers Union and the Electrical Contractors of New York City

had agreed on work rule restrictions, under which Local 3 refused to handle or install electrical fixtures and equipment made or assembled outside the New York City area. It was agreed that, in lieu of absolute prohibition, the union would dismantle and rebuild the "foreign" equipment or be paid the equivalent thereof. Local 3 had no active labor dispute with the "foreign" manufacturers, nor did it have any interest in the working conditions at such factories. It was not concerned with whether the "foreign" fixtures were union made — in fact, it barred fixtures made by its sister local union in New Jersey. Further, Local 3 was not concerned with whether the immediate contractor had or did not have "control of the work." Clearly, the union's ultimate objective was to preserve work for its members. The intermediate objective, as the means to its ultimate goal, was the boycott of foreign products. It was the inadequancy of antitrust remedies, demonstrated in *Allen Bradley, supra,* that led directly to the Taft-Hartley prohibition of secondary boycotts.[3]

Our own court in *Joliet Contractors Association* v. *National Labor Relations Board,* 202 F. 2d 606 (1953), cert. den. 346 U.S. 824, considered an area boycott similar to that in *Allen Bradley.* It was a typical product boycott case. There Glazier's Union Local 27 had a rule that preglazed window sashes could not be installed, and the union's bylaws and agreements with the contractor provided that all sash and glass work must be done on each respective job site or building. We rejected the argument there made that the union's dispute with the contractor was only primary and that its objective was preservation of work on the job, saying, at 610:

"* * * the fact remains that the target was the use of preglazed sash, and any and all who handled, used

[3] Legislative History of the Labor Management Relations Act, 1947, pp. 1055-1056, 93 Cong. Rec. 4255.

> or sold such sash were the intended and in many cases the actual victims of the Union's course. Moreover, we are not convinced that a Union violation of the provision under discussion is dependent upon whether its activities are primary or secondary. * * *"

In the case at bar the Union's target was and is prefabricated doors. Neither here nor in *Joliet Contractors* was there a labor dispute between the union and any manufacturer.[4] In *Joliet Contractors* we found the union's refusal to install such products to be a violation of § 8 (b) (4) (A).[5] At that time the proviso in § 8 (b) (4) (B) had not been enacted.

We find nothing to the contrary in *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *National Labor Relations Board, et al.*, 366 U.S. 667 (1961), relied on in the brief of the Union.

Our views find support in *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters, etc.*, 6 Cir., 242 F. 2d 932 (1957) which involved § 8 (b) (4) (A)[6] of the Act. The Board there contended that the carpenters' union induced a concerted refusal by the employees of the subcontractors to handle prehung doors in a building project in Ohio, which doors had been manufactured in Indiana and Michigan and were sold as component parts of prefabricated home units to the general contractor in the Cleveland, Ohio area.

Judge Stewart (now Justice Stewart) said at 934:

> "Substantially adopting the Trial Examiner's Intermediate Report, a majority of the Board found

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[4] As in *Allen Bradley*, in the case at bar the Union was not concerned with whether the boycotted doors were union made.

[5] Now known as (B).

[6] Now known as (B).

the respondents had induced and encouraged employees of the subcontractors to engage in a concerted refusal to handle the prehung doors; and that objectives of the respondents' conduct were to force or require the subcontractors to cease using prehung doors, to force or require Erie Building Company to cease using and purchasing prehung doors, and to force or *require Scholz Homes, Inc., to cease doing business with the manufacturers of the doors.* (Italics supplied.)

• • •

"The fact that there was not an active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents from the terms of § 8(b) (4) (A) of the Act, which neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. N. R. L. B. [sic] v. Washington-Oregon Shingle Weavers' Dist. Council, 9 Cir., 1954, 211 F. 2d 149, 152-153.

• • •

"This brings us to the respondents' primary defense. They say that even if they encouraged and induced a concerted work stoppage by employees with respect to the doors, this did not constitute an unfair labor practice within the meaning of § 8 (b) (4) (A) because the immediate employers (the subcontractors) had acquiesced in advance in the employees' action by virtue of a collective bargaining agreement containing a 'hot cargo' clause, and also by reason of the fact that the subcontractors themslves [sic] belonged to the union, and as union members were obligated not to use the prehung doors. Although the Board found upon conflicting evidence that no collective bargaining agreement containing a 'hot cargo' clause was then in effect, it is conceded that the subcontractors were members of the union and that they acquiesced in the conduct of their employees in not handling or working on the doors in question."

By an amendment enacted in 1959, subsection (e) was added to § 8 of the Act, 29 U.S.C.A. § 158, providing, in part:

> (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: * * *.

The distinction between job site work and factory-made products is recognized in the foregoing construction proviso of § 8 (e) itself. The legislative history shows that it was explained by Senator Kennedy that the "proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite."[7]

We hold that § 8 (e) unaffected by the proviso is controlling in this case.

For all of these reasons, that part of the Board's order entered November 12, 1964 dismissing, in part, the complaint against the Council is set aside and this cause is remanded to the Board with instructions to enter an order finding that the Council violated § 8 (b) (4) (i) (ii) (A) and § 8 (e) of the Act, as set forth herein, as well as § 8

[7] J.A. 135; II Leg. Hist., p. 1443.

(b) (4) (i) (ii) (B) to the extent found by the Board, which action we affirm.

The Board is directed to restrain any further such proscribed violations of the Act by the Council in the Philadelphia area.

IN PART AFFIRMED AND IN PART SET ASIDE AND REMANDED WITH DIRECTIONS.

A True Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.